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IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF WISCONSIN

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WESTERN DISTRICT OF WISCONSIN

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NEIL GAIMAN and
MARVELS AND MIRACLES, LLC,

Plaintiffs,

-vs-

TODD MCFARLANE, TODD MCFARLANE
PRODUCTIONS, INC., TMP
INTERNATIONAL, INC., MCFARLANE
WORLDWIDE, INC., and IMAGE
COMICS, INC.,

Defendants.

= = = = =

03-1461

Case No.
02-C-0048-S

Telephonic Deposition of:

STEVEN SCOTT SMITH

Madison, Wisconsin
August 27, 2002

U.S.C.A.—7th Circuit
FILED

NOV 23 2003 JC

GINO J. AGNELLO
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Reported by: Jill Benson, RPR DOC. # _____

ORIGINAL

TWO EAST MIFFLIN STREET • SUITE 102
MADISON, WISCONSIN 53703

MADISON: 608•255•7700 FAX: 608•255•7749 MILWAUKEE: 414•276•3886
1•800•255•7710 e-mail: verbatim@gdincl.com www.verbatim-madison.com

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I N D E X

<u>WITNESS</u>	<u>Page(s)</u>
STEVEN SCOTT SMITH	
Examination by Mr. Simmons	4
Examination by Mr. Feldmann	33

E X H I B I T S

<u>No.</u>	<u>Description</u>	<u>Identified</u>
129	Memo	4

(Attached to the original transcript
and copies provided to counsel)

1 TELEPHONIC DEPOSITION of STEVEN SCOTT
2 SMITH, a witness of lawful age, taken on behalf of
3 the Plaintiffs, wherein Neil Gaiman and Marvels and
4 Miracles, LLC, are Plaintiffs, and Todd McFarlane,
5 Todd McFarlane Productions, Inc., TMP International,
6 Inc., McFarlane Worldwide, Inc., and Image Comics,
7 Inc., are Defendants, pending in the United States
8 District Court for the Western District of
9 Wisconsin, pursuant to notice, before Jill Benson, a
10 Registered Professional Reporter and Notary Public
11 in and for the State of Wisconsin at the offices of
12 Foley & Lardner, Attorneys at Law, 150 East Gilman
13 Street, in the City of Madison, County of Dane, and
14 State of Wisconsin, on the 27th day of August, 2002,
15 commencing at 1:30 in the afternoon.

16
17
18 A P P E A R A N C E S

19 JEFFREY A. SIMMONS, Attorney,
20 for FOLEY & LARDNER, Attorneys at Law,
21 150 East Gilman Street, Madison,
22 Wisconsin, appearing on behalf
23 of the Plaintiffs.

24 PETER SALSICH, Attorney,
25 for BLACKWELL SANDERS, LLP, Attorneys at Law,
720 Olive Street, Suite 2400, St. Louis,
Missouri 63101, appearing on behalf
of Defendants Todd McFarlane, Todd
McFarlane Productions, Inc., TMP
International, and McFarlane Worldwide,
Inc., via telephone.

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R. SCOTT FELDMANN, Attorney,
for BROBECK, PHLEGER & HARRISON, LLP,
Attorneys at Law, 38 Technology Drive,
Irvine, California 92618, appearing on
behalf of Defendant Image Comics via
telephone.

1 (Exhibit No. 129 marked for
2 identification)

3 STEVEN SCOTT SMITH,

4 called as a witness, being first duly sworn,
5 testified on oath as follows:

6
7 EXAMINATION

8 By Mr. Simmons:

9 Q Mr. Smith, have you ever had your deposition taken
10 before?

11 A No.

12 Q Okay. I'll just explain some of the ground rules to
13 you here. Basically I'm going to be asking you a
14 series of questions and looking for your answer to
15 those questions. We've got this court reporter here
16 who is typing all of our statements down as we
17 speak, and so it's just important that we be clear
18 when we're speaking so that she gets everything down
19 accurately.

20 A Okay.

21 Q And as part of that, you and I just have to try not
22 to talk over each other. So if I'm asking a
23 question, just try to let me finish, and when you're
24 giving an answer, I'll try not to cut you off in
25 your answer, and that way it will help the court

Deposition of STEVEN SCOTT SMITH, 8/27/02

1 reporter make a clear record.

2 A All right. We'll keep from stepping over each
3 other.

4 Q Now, you don't have an attorney on your end; is that
5 right, Mr. Smith? You don't have an attorney
6 representing -- sitting with you right now in
7 West Virginia; correct?

8 A Right.

9 Q Okay.

10 A I do not.

11 Q The other attorneys on the line, while I'm asking
12 questions, they may want to jump in and make an
13 objection at some point, and they're free to do
14 that. Although if they make an objection, generally
15 you'll still be required to answer the question. If
16 there's any confusion, we'll help to straighten it
17 out for you. Also, if I ask you a question and it
18 doesn't make any sense to you or you're a little
19 confused, feel free to just let me know that you're
20 confused and I'll try to rephrase the question.
21 Otherwise if I ask you a question and you give me an
22 answer, I'm going to assume that you understood the
23 question and that your answer is responsive to it.
24 Do you have any questions right now?

25 A No, not yet.

Deposition of STEVEN SCOTT SMITH, 8/27/02

1 Q Okay. Did you do anything to prepare for this
2 deposition, Mr. Smith?

3 A No, not really.

4 Q And actually, along with that I should make sure,
5 did you receive a copy of Exhibit 129? I Federal
6 Expressed it to you today.

7 A Yes. I have it right in front of me.

8 MR. SIMMONS: Pete and Scott, have
9 you got that also? It should have been faxed
10 to you.

11 MR. SALSICH: Yeah, I got it, Jeff.

12 MR. FELDMANN: Yes.

13 MR. SIMMONS: And that is, as far
14 as I know, is going to be the only exhibit,
15 unless something unexpected comes up.

16 Q Mr. Smith, have you spoken with Todd McFarlane or
17 any of Todd McFarlane's attorneys at any point
18 during this past year?

19 A Yes.

20 Q Okay. Who did you speak to?

21 A I spoke not -- okay. Here's where I'm a little
22 confused. By speaking to them, do you mean hi, how
23 are you, or about this in particular?

24 Q About this case in particular, the lawsuit between
25 Mr. Gaiman and Mr. McFarlane and Mr. McFarlane's

Deposition of STEVEN SCOTT SMITH, 8/27/02

1 companies.

2 A I talked to Michael Kahn last week or two, two
3 weeks, I guess.

4 Q Okay. And what did you talk about?

5 A Mr. Kahn let me know that there was going to be a
6 deposition.

7 Q Okay. Did you talk at all about sort of the
8 substance of the dispute between Mr. Gaiman and
9 Mr. McFarlane?

10 A No. It was pretty much just giving me a heads-up
11 that there was going to be a deposition.

12 Q Did he ask you any questions about what you may have
13 remembered about the relationship between Mr. Gaiman
14 and Mr. McFarlane?

15 A No.

16 Q Have you talked to anybody else about this lawsuit?

17 A Not that I remember.

18 Q Okay. Now, I'd just like to get a little background
19 information from you.

20 A Sure.

21 Q First of all, how old are you?

22 A I'm 47. I'll be 48 in December.

23 Q And can you just sort of briefly walk me through
24 your employment history, say, you know, since high
25 school or college, you know, just kind of hit the

Deposition of STEVEN SCOTT SMITH, 8/27/02

1 high points. I don't need to know about every
2 little job.

3 A I worked audio/video sales during college.
4 Afterwards worked, let's see, gun sales. I worked
5 construction as a bridge inspector. I worked
6 warehouse for a medical company.

7 Q And let me just stop you there. What time period
8 are we talking about for these jobs?

9 A Well, late '70s, early '80s.

10 Q Okay.

11 A Let's see, various retail jobs which some were --
12 most were in sales, and whether it would be hardware
13 or audio/video sales, again, that sort of thing.
14 And then about '85, '86 I went to work for Eclipse
15 Comics, and then about -- let me see, about 1993
16 went to work for Image Comics, and I was working
17 part time for Todd McFarlane during that time,
18 helping him out with promotions and marketing and
19 stuff.

20 Q And this is during the time you were working for
21 Image Comics?

22 A Yeah.

23 Q What was your --

24 A Well, we -- I worked part -- actually I worked part
25 time for him, and then when Image needed me full

Deposition of STEVEN SCOTT SMITH, 8/27/02

1 time, I went over to them full time and then, you
2 know, Todd, you know, kind of was one of the
3 co-owners, so I worked for all of them then at that
4 point, which was about 1993.

5 Q And I'm sorry, so did you say you were working for
6 Todd McFarlane personally first prior to Image
7 Comics?

8 A I'm trying to remember because I went from Eclipse,
9 and Eclipse took a long time to drag out. And let's
10 see, that's hard to remember. '93 for Image Comics
11 full time sticks in my head, and -- because I
12 remember full time. So I guess that's about as best
13 as I can recollect. My employment with Todd really
14 didn't start full time because things started
15 getting bigger for him probably about '95 or '96.
16 Then, you know, I was not with Image at all and it
17 was with Todd McFarlane Productions full time.

18 Q Okay. So let me back you up again for a second.
19 Who was it that approached you about coming to work
20 for Image Comics?

21 A Oh, originally that would be Todd. I had a meeting.
22 I flew out, had a meeting with Todd and the rest of
23 the owners. This is -- I think it was in Fullerton,
24 California, and that was -- at the time they wanted
25 me to, like, you know, head up the whole thing, but

Deposition of STEVEN SCOTT SMITH, 8/27/02

1 it was times seven different owners. It was a
2 little confusing to me. It wasn't the kind of a
3 situation I wanted to get in at the time because
4 they all seemed to want to go different ways. So at
5 that point I said no, you know, I don't want to do
6 this.

7 Then later on, I don't remember what year,
8 they brought Larry Marder in and Larry said, you
9 know, at that time he says, you want to come over,
10 you know, I need a head of marketing type of thing,
11 and that's what you did at Eclipse, so you want to
12 do it here? So I was able to do that here, as I
13 worked for Eclipse, here in West Virginia.

14 Q So ultimately Larry Marder was the one who recruited
15 you to come over to Image Comics?

16 A Yeah, I guess. To be honest, you probably have to
17 check with Larry and Todd exactly on that because I
18 really don't remember exactly.

19 Q And there was a period of time -- maybe I'm wrong.
20 It sounded like there was a period of time where you
21 were working for both Eclipse and Image; is that
22 correct?

23 A You know, I'm trying to think. No. No, I don't
24 think there was a time I was getting a check from
25 both of them. Let me think. There was a time

Deposition of STEVEN SCOTT SMITH, 8/27/02

1 towards the end of Eclipse when Dean Malaney, who
2 owned Eclipse, knew that, you know, things were
3 heading down the tubes kind of, and I think for a
4 while there I was working for Todd part time,
5 helping him out with some stuff, and it was okay
6 with Dean. That would probably be, I guess, about
7 '92, '93, I think.

8 Q Okay. So when you finally did come over to Image,
9 what were your duties at Image?

10 A I was head of sales and marketing promotions.

11 Q And what did you do in that position?

12 A In the direct markets of comic books, I made sure
13 that, you know, I worked with the distributor, which
14 at the time we had more than one, but it was
15 Diamond & Capital Distribution, worked with them,
16 and I worked with Comic Book Press, you know, make
17 sure we got promotions and that our books got
18 attention and stuff like that.

19 Q Do you recall how many other employees Image had
20 during the time you worked for them?

21 A Well, are you talking the Image central office that
22 was in Anaheim?

23 Q I guess total, if you know. I didn't realize they
24 had other offices.

25 A Yeah. I don't know.

Deposition of STEVEN SCOTT SMITH, 8/27/02

1 Q How many at the central office, then?

2 A I would guess probably eight to ten people.

3 Q And who was your direct superior, if you had one?

4 A That would be Larry Marder.

5 Q Do you recall what Larry's title was at the time?

6 A I think he was an executive director of
7 Image Comics. I think that was his title.

8 Q So was your impression he was sort of the senior
9 employee?

10 A Yeah. He was the guy that was the go-between
11 between all the different studios.

12 Q And then I think you said you think it was '95 or
13 '96 you came over and worked for Todd McFarlane
14 Productions; is that right?

15 A Right.

16 Q And what were your duties at Todd McFarlane
17 Productions?

18 A I was in charge of, like, promotions, marketing,
19 sales. Again, the same thing I did for Image Comics
20 I kind of did for him, making sure the comic books
21 got, you know, press, and we worked with the
22 distributors, that sort of thing.

23 Q Okay. Did you work with any other comic book
24 companies to the extent -- or comic book publishers?

25 A I don't understand. Get a check from them?

Deposition of STEVEN SCOTT SMITH, 8/27/02

1 Q No, just had contact with them. For example,
2 Exhibit 129 seems to indicate some contact with
3 DC Comics, so I'm wondering during your -- other
4 than Exhibit 129, were there times when you had
5 contacts with someone at DC Comics?

6 A Oh, well, trying to think. By contact you mean -- I
7 mean, in this business we talk to, you know, a lot
8 of people every day type of thing. You mean actual
9 business between Todd McFarlane and, say, DC Comics?

10 Q Yeah, exactly. Did you ever handle any business
11 dealings between Mr. McFarlane and DC Comics?

12 A When he did the Spawn/Batman crossover, I kind of
13 was talking to my counterparts there on occasion.
14 That was about it.

15 Q Do you recall approximately when the Spawn/Batman
16 crossover occurred?

17 A No. I would have to look up, you know, the comic
18 book to see -- each comic book as a little indentia
19 that it would tell what year it was. I can't
20 remember.

21 Q And so what exactly was your role for Todd McFarlane
22 with regard to the Spawn/Batman crossover?

23 A Probably just transferring of information, like
24 when -- if you want to do it or when do you want to
25 do it, how much is your cover price going to be, how

Deposition of STEVEN SCOTT SMITH, 8/27/02

1 much is our cover price going to be. Simple details
2 like that.

3 Q Did you have a particular contact person at
4 DC Comics that you usually dealt with?

5 A Not a particular one that I remember.

6 Q Who are some of the people that you remember dealing
7 with at DC Comics?

8 A Trying to think. Trying to think who the editor
9 was. You know, I honestly don't remember.

10 Q Okay. I'm going to go back in time a little bit
11 again here to back when you were with Image Comics
12 sort of in the 1993 time period. Actually, let me
13 scratch that. Let me just change a little bit here.
14 When was the first time, if at all, you remember
15 having contact with Neil Gaiman?

16 A I really don't remember.

17 Q You have met Mr. Gaiman, though?

18 A Oh, I've met him and -- I'm trying to think.
19 Probably the first time I talked to Neil was
20 probably when I worked for Eclipse.

21 Q When you were with Eclipse, were you involved in the
22 publication of the Miracle Man series at all?

23 A Make sure we got press on it and our solicitations
24 got to the distributor, that sort of thing.
25 Editorially it was handled by Dean Malaney. He was

Deposition of STEVEN SCOTT SMITH, 8/27/02

1 the publisher and owner, and his wife and co-owner
2 and editor, Cat Yronwode, and she spells her name
3 Y-r-o-n-w-o-d-e.

4 Q So when you were employed at Eclipse, during that
5 time period, do you remember Neil Gaiman authoring
6 issues of Miracle Man?

7 A Yeah. Neil was one of the people that wrote the
8 comic, and Miracle Man was one that he wrote for us.

9 Q Was Mark Buckingham the illustrator during that
10 time?

11 A Mark worked with him, uh-huh.

12 Q Did you have any understanding about whether or not
13 Mr. Buckingham and Mr. Gaiman may have owned some of
14 the rights to the Miracle Man stories or artwork
15 that they created?

16 A I was never privy to any of those kind of
17 conversations, you know.

18 Q What was your role, then?

19 A To make sure the comic book got, you know, like our
20 solicitation got to the distributors and that we got
21 press on our comics, that sort of thing.

22 Q Okay. So now moving ahead, sorry we're jumping
23 around here, but moving ahead to when you come to
24 Image Comics. I'll represent to you that
25 Neil Gaiman and Todd McFarlane worked together on

Deposition of STEVEN SCOTT SMITH, 8/27/02

1 Spawn issue number 9. Did you have any involvement
2 in the publication of Spawn issue number 9?

3 A I don't remember what year that was.

4 Q Approximately 1993.

5 A Okay. So I was at Image then. So it would be, you
6 know, the regular stuff of making sure like all our
7 other Image books, that solicitations got to the
8 distributors and the trade press knew we got this
9 comic coming out, you know, that sort of thing.

10 Q Do you recall ever having any dealings with
11 Mr. Gaiman regarding publications that Mr. Gaiman
12 was working on for Todd McFarlane Productions or
13 Image Comics?

14 A Do you mean as far as like editorial?

15 Q I guess --

16 A Or in general?

17 Q Any in general. And if so, you tell me what the
18 type of interaction was.

19 A Not that I recall. I really don't remember.

20 Q Were you involved at all in the publication of the
21 Angela series of comic books?

22 A Again, I don't know what year that was, if that was
23 the '90s, you know.

24 Q I'll represent to you that it's 1994.

25 A Okay.

Deposition of STEVEN SCOTT SMITH, 8/27/02

1 Q Early 1994.

2 A Yeah, then, just like all the other Image Comics, I
3 was, you know, making sure our solicitations got to
4 the distributors and we got press and the trade
5 magazines, that sort of thing.

6 Q When you were at Image Comics, my understanding of
7 how Image Comics works is it's a group of sort of
8 separate comic book publishers who have come
9 together to use Image to put their comics together
10 for them, but they're a separate comic book
11 publishers or creators who are all part of
12 Image Comics. It's kind of a vague description, but
13 does that sort of generally fit your understanding
14 of how they operate?

15 A Yes.

16 Q I'm just wondering, when you were at Image, was
17 there any one of those individual publishers that
18 you tended to do most of your work for, or did you
19 work for all of the various publishers at Image?

20 A No. When I was at Image, it was pretty much day to
21 day all of them.

22 Q You didn't necessarily emphasize working for
23 Mr. McFarlane's companies any more than anybody
24 else?

25 A No. It was all pretty equal because, granted, you

Deposition of STEVEN SCOTT SMITH, 8/27/02

1 had some like WildStorm at the time and Extreme
2 Studios which put out more books, which, if you
3 really broke it down to timewise during the day, you
4 know, you might spend a little more time because
5 they were putting out -- put an imaginary number,
6 15, 16 books a month. That does take a little more
7 time, you know, as compared to, say, Todd McFarlane
8 is just putting out Spawn. Jim Valentino was just
9 putting out Shadow Hawk, you know, like that. It's
10 for the whole company. It's like working in a
11 doughnut factory. You know chocolate doughnuts are
12 your best seller, you spend more time on chocolate
13 doughnuts, but it still covers the company as a
14 whole.

15 Q You authored an issue of -- an issue of the Angela
16 comic book, didn't you?

17 A Yes, sir.

18 Q Can you just tell me how you came to do that?

19 A Well, originally when Todd, to the best of my
20 recollection, when Todd started doing toy comics,
21 you know, comic books put into the toy.

22 Q Like an action figure, for example?

23 A Yeah.

24 Q And then when they sell the action figure, there's a
25 comic book that's inserted into the box with the

Deposition of STEVEN SCOTT SMITH, 8/27/02

1 action figure?

2 A Yeah. That originally, I think, because it was only
3 16 pages, if I remember right.

4 Q That's the Angela comic book that you authored?

5 A Yeah. Wait a minute. No. No. No. No. No. I do
6 recall now. That was a special retail incentive
7 comic. It was a Diamond distribution with Ultra
8 Pro. They make the little sleeve that you put
9 comics in. If you ordered X amount cases of
10 Ultra Pro sheets, you know, these protector sheets,
11 you got, you know, one of those copies. That's what
12 that was. I got it confused because our comics went
13 into the toys for 16 pages as well, and that was a
14 real thin comic. That's what that was for.

15 Q And so that Angela comic was an incentive that
16 retailers, something that retailers would get for
17 free?

18 A Yes. If they bought X amount of Ultra Pro sheet
19 protectors from Ultra Pro or Diamond, I don't
20 remember how they worked that out, that's where --
21 that's what it was.

22 Q And in the process of your writing -- well, what
23 exactly did you do? Did you just write the script
24 for the Angela comic, or did you do artwork as well?

25 A No. I can't draw a straight line with a ruler. It

1 was all just the writing.

2 Q Okay. In the course of writing that Angela comic
3 book, did you talk to Neil Gaiman at all to get an
4 understanding of how he went about writing his
5 Angela comic books?

6 A Not that I remember.

7 Q Do you recall talking to Mr. Gaiman at all about the
8 Angela comic book you were writing?

9 A Not that I remember.

10 Q Do you recall that Angela comic book subsequently
11 being republished in an Angela trade paperback?

12 A Yes.

13 Q Okay. And then is it your understanding that in
14 later editions of that Angela trade paperback, your
15 comic was not included in those issues?

16 A Right. Yes.

17 Q Do you know why it wasn't included?

18 A I have no idea.

19 Q Now, were you, in approximately 1996, 1997 time
20 period -- can you hear me okay down there?

21 A Yeah. Excuse me, I was just coughing.

22 Q It's quite all right. If you need to take a break
23 at any time, let us know. Hopefully this should not
24 take too long.

25 A No problem.

Deposition of STEVEN SCOTT SMITH, 8/27/02

1 Q In the 1996, 1997 time period, you were working for
2 Todd McFarlane Productions; correct?

3 A Yes.

4 Q And during that time when you were working for
5 Todd McFarlane Productions, at that time, who did
6 you report to?

7 A Todd McFarlane.

8 Q Okay. And where were you working out of?

9 A West Virginia.

10 Q And where was Todd McFarlane Productions located at
11 that point?

12 A Let's see, '96, I don't remember if he was still in
13 the Portland area or if he had moved to Phoenix.

14 Q Approximately how often during that time period
15 would you talk to Todd McFarlane?

16 A Around '96, I would say close to daily.

17 Q You sort of call in periodically just to get an
18 update on what was going on?

19 A Yeah, or to tell him, you know, need solicitation
20 for this. If he was doing artwork, I might ask him
21 if he finished his artwork yet, you know, so we
22 would have it for solicitation, that sort of thing.

23 Q And during the 1996, 1997 time period, do you
24 remember hearing from either Mr. McFarlane or
25 anybody else that Mr. McFarlane and Mr. Gaiman were

Deposition of STEVEN SCOTT SMITH, 8/27/02

1 involved in some negotiations regarding royalties
2 for work that Mr. Gaiman had done?

3 A I remember hearing about it more through, I guess
4 you call it the grapevine, but not directly. Todd
5 never asked me, you know, what he should do one way
6 or another on something like that.

7 Q What do you remember hearing?

8 A That they were going through some sort of
9 negotiations, possible negotiations on characters or
10 work that Neil had done.

11 Q Do you remember ever talking to Larry Marder about
12 those negotiations?

13 A I don't remember.

14 Q Do you remember talking to anybody in particular
15 about those negotiations?

16 A No, I really don't remember.

17 Q Do you remember hearing from anyone whether
18 Mr. McFarlane and Mr. Gaiman had reached an
19 agreement during 1996 or 1997?

20 A No, I don't remember hearing that.

21 Q Do you remember hearing that Mr. McFarlane was
22 paying royalties to Mr. Gaiman during that time
23 period?

24 A Trying to think, Jeff. No, I really don't remember.
25 I mean, -- no.

Deposition of STEVEN SCOTT SMITH, 8/27/02

1 Q Okay. Why don't we turn to Exhibit 129.

2 A Okay.

3 Q And you said you've got that in front of you?

4 A Yeah. It's right here.

5 Q Do you recognize Exhibit 129?

6 A Yeah.

7 Q Is that a memo that you wrote to Todd McFarlane and
8 Sheila Egger?

9 A Yes.

10 Q And in the first line of that it says, "I need to
11 speak to you about the Neil Gaiman situation." Do
12 you see that?

13 A Yes.

14 Q And then in parentheses it's Medieval Spawn/Batman?

15 A Yeah.

16 Q Can you explain to me, to the best of your
17 recollection, what you meant by those words, "the
18 Neil Gaiman situation"?

19 A As best of my recollection, I think, and I'm not
20 positive, I might have been talking about a Medieval
21 Spawn/Batman crossover, possibly. I'm not real
22 sure. It's been awhile.

23 Q And then right after that you say -- well, actually
24 going down two sentences, it says, "Since you signed
25 the deal to let him do it, let's get it over with."

Deposition of STEVEN SCOTT SMITH, 8/27/02

1 A Uh-huh.

2 Q What was the deal you were referring to there?

3 A Again, I really don't remember because that's --
4 it's kind of confusing because it's been so long. I
5 remember, you know, I don't know if it was this
6 situation or not, but, you know, Todd runs his
7 company, and Todd is the guy that carries the balls.
8 It's always hard trying to get -- you know, it's
9 always hard to, you know, especially when he's doing
10 artwork for something, you know, you got this done
11 yet, you got this in yet. It's kind of hard asking
12 your boss if he's got some work he's got done yet,
13 but it's -- but yeah, I really don't remember on
14 that.

15 Q But was it your understanding that there was some
16 sort of deal to allow Mr. Gaiman to do a Medieval
17 Spawn/Batman crossover?

18 A You know, it's right here, but I really don't
19 remember that long ago, you know. This was just one
20 memo out of probably hundreds that I wrote during
21 that time. And again, I wasn't that privy to a lot
22 of stuff, so you know, I really don't remember. I
23 need more help on that.

24 Q Before that, though, you say, "You," I think you
25 mean you and I "talked a little bit about it a

Deposition of STEVEN SCOTT SMITH, 8/27/02

1 couple of weeks ago."

2 A Yeah. My typos. As you can tell, I don't have a
3 secretary to type this stuff up.

4 Q It's all right. As long as we understand what you
5 meant there. So what do you recall about you and
6 Mr. McFarlane talking about?

7 A You know, I really don't remember. I mean, it's,
8 again, awhile back, and it -- just nothing in
9 particular really catches my thought on it.

10 Q Well, do you remember Neil Gaiman ever calling you
11 about a potential Medieval Spawn/Batman crossover?

12 A No, I don't recall. I do recall talking to Neil
13 back in the Eclipse days when, you know, they didn't
14 pay him a couple times, and he was trying to find
15 somebody that would take his calls, but no, I don't
16 recall.

17 Q Do you recall anybody -- Batman is published by
18 DC Comics, is that your understanding?

19 A Yes.

20 Q Do you remember anybody from DC Comics ever calling
21 you to talk about a Medieval Spawn/Batman crossover?

22 A No, I don't remember.

23 Q You don't remember anybody ever contacting you about
24 that?

25 A Medieval Spawn/Batman thing, no, I can't remember.

Deposition of STEVEN SCOTT SMITH, 8/27/02

1 Q Or any sort of crossover with -- between Neil Gaiman
2 and DC Comics?

3 A No, not that I remember.

4 Q Do you know a guy named -- I think it's Mike Carlin
5 over at DC Comics?

6 A Yeah. He's a -- like an executive editor. He's
7 editor in chief type of thing for DC Comics.

8 Q Do you recall ever speaking to Mike Carlin about a
9 potential Medieval Spawn/Batman crossover?

10 A Well, I really don't remember.

11 Q Do you need to deal with that?

12 A No. Machine will pick that one up.

13 Q Okay.

14 A I mean, I talked to Mike, you know, on and off for
15 the last 15 years about, you know, a lot of
16 different stuff, but I just don't recall talking to
17 him about that in particular. I don't remember.

18 Q Did you ever talk to Mr. Carlin about any sort of --
19 any sort of crossovers, whether they dealt with
20 Mr. Gaiman or not?

21 A In all the time I talked to him in the last 15
22 years, I really don't remember on that particular
23 subject. I really don't remember.

24 Q Okay. Now, you wrote this memo though; correct?
25 You do remember writing this?

1 A Yes.

2 Q And the memo has a date of July 6, 1998?

3 A Yes.

4 Q Were you employed by Todd McFarlane Productions at
5 that time?

6 A Yes.

7 Q So was this memo something you wrote just sort of in
8 the ordinary course of your business with
9 Todd McFarlane Productions?

10 A You mean just like writing a memo, you know,
11 everyday type of thing or, you know, regular
12 business type thing?

13 Q Correct.

14 A Uh-huh.

15 Q That's what this would have been?

16 A Yes.

17 Q Okay. Just give me a second here. Just looking
18 through my notes.

19 A Sure, go ahead.

20 Q Are you still employed by Todd McFarlane
21 Productions?

22 A No, Jeff.

23 Q When did you end your employment with them?

24 A It was, I believe, August 31st of last year.

25 Q Okay. And why did you leave?

1 A Well, Todd was wanting to consolidate all his
2 outside offices, as many as possible, which was like
3 my office and the toy office that was in Michigan,
4 and bring everything, you know, to Phoenix as much
5 as he could to, you know, consolidate, you know,
6 keep everything, you know, under one roof. And back
7 when I started working for Eclipse and Image and
8 everything, you know, through fax, phone, FedEx, all
9 this, you know, always -- that was always one of my
10 things that, you know, I want to work here in
11 West Virginia. This is where my family is. This is
12 where I want to be. This is where I need to be, and
13 that was always something that was agreed on
14 beforehand.

15 And it had just, you know, Todd's company was
16 just getting bigger and bigger. Todd felt it was
17 time, in the best interest of the company, to move
18 everything under one roof. And I decided at that
19 point, you know, he made me an offer to come out
20 there, but it was just best for me, you know, to
21 stay here.

22 Q And so what are you doing now?

23 A I'm vice president of sales and marketing for Idea &
24 Design Works.

25 Q What do you do for them?

1 A Handle their sales and marketing for -- it's a
2 creative service company. We do like DVD menus for
3 motion picture studios. We design card games for
4 the entertainment division of Upper Deck Card
5 Companies like Survivor and things like that. We've
6 done national ads, like, for three deodorants, and
7 we also publish graphic novels and a couple comic
8 books.

9 Q Okay. Let me -- I'm just going to take a minute
10 here. I may be done, but let me just put you on
11 hold for a second. I should be back in just two
12 minutes. Okay?

13 A You want me to hang here?

14 Q Sure, if you don't mind.

15 (Recess)

16 MR. SIMMONS: Who do we still have
17 here? This is Jeff, I'm back.

18 MR. FELDMANN: Scott.

19 MR. SIMMONS: Okay. Pete, you
20 back?

21 MR. SALSICH: I'm here.

22 Q Okay. I just have one last question, just to make
23 sure I've got everything here, Mr. Smith. Again, on
24 Exhibit 129, I apologize if I asked you this before.

25 A No, go ahead.

1 Q I just wanted to make sure, although I know you say
2 you no longer recall the events at that time period,
3 is it correct that you don't have any reason to
4 doubt that Exhibit 129 is an accurate representation
5 of your understanding of events at that time? Does
6 that make sense to you?

7 A No.

8 Q I just want to make sure, again, you don't have any
9 reason to doubt that Exhibit 129, when you wrote it,
10 that it was an accurate representation of what you
11 were trying to communicate to Mr. McFarlane at that
12 time?

13 A Well, I mean, I wrote this, but I don't recall, you
14 know, exactly what it was all about. I wish I
15 could.

16 Q Sure.

17 A But again, I wrote so many memos and still do to
18 this day, I mean, I can tell you yes, I did write
19 it. But as far as content, I really don't remember
20 a whole lot of what it was about.

21 Q But when you wrote memos to Mr. McFarlane, you were
22 always trying to make sure that they were accurate,
23 fair statement?

24 A Yeah. I didn't like to write and lie to him. That
25 wasn't good for my job. But I mean, I remember

1 writing, you know, this is my memo, but I just don't
2 remember all the details about the content.

3 Q And that's fine.

4 A You can tell -- you know, I've written comics for
5 15 years. You can tell that this isn't your typical
6 business memo because of my witty humor that I have
7 put in here, but -- because I mean, I'm sure you
8 guys working in law offices don't come across these
9 kind of memos on a day-to-day basis, but you working
10 in a creative industry, I guess, you know, you kind
11 of get guys think they're funny.

12 Q Sure. Yeah, this might not have been a typical memo
13 for most offices, but in a comic book company it may
14 have been more common?

15 A Yeah. It is, you know, this is my memo, but again,
16 I just don't remember, you know, the context.

17 Q But again, you don't have any reason to doubt that
18 when you wrote it, you were trying to be as accurate
19 as possible to Mr. McFarlane?

20 A If I could remember that, then I would remember the
21 situation, Jeff. I really just don't remember the
22 content.

23 MR. SIMMONS: Okay. That's all
24 I've got. If Mr. Feldmann or Mr. Salsich want
25 to ask you questions, they can do so now.

Deposition of STEVEN SCOTT SMITH, 8/27/02

1 Pete or Scott?

2 MR. FELDMANN: I have a few
3 questions.

4

5 EXAMINATION

6 By Mr. Feldmann:

7 Q Mr. Smith, my name is Scott Feldmann. I represent
8 Image Comics, and I just have a few questions about
9 your witty memo here.

10 A Oh, thanks, Scott.

11 Q You're right, for us lawyers it's a treat to find
12 something that's written with a little bit of wit.

13 A Yeah, if you want to call it that.

14 Q Now, if you'd look at this, you'll see in the second
15 paragraph, that second sentence where you said,
16 "Since you signed the deal to let him do it, let's
17 get it over with." Do you see that?

18 A Yes.

19 Q Then you ask, "Are we getting anything from or out
20 of ol' Neil"?

21 A Yes.

22 Q Okay. Now, did you know what the terms of the deal
23 that you referenced or negotiations were between
24 Mr. McFarlane and Mr. Gaiman?

25 A I don't remember the deal at all.

Deposition of STEVEN SCOTT SMITH, 8/27/02

1 Q Okay. Did you ever see a written and signed
2 contract between Mr. Gaiman and Mr. McFarlane or one
3 of those companies?

4 A No.

5 Q Okay. Did you conduct any negotiations where you
6 acted as an intermediary between the two gentlemen?

7 A For what?

8 Q To conclude some sort of a deal about rights to
9 Miracle Man or the Spawn characters?

10 A No, I don't remember doing that.

11 Q Would you agree that the persons who would know best
12 if a final deal was ever reached would be
13 Mr. McFarlane and Mr. Gaiman?

14 A Yes.

15 MR. FELDMANN: All right. That's
16 basically all that I have. And thank you,
17 Mr. Smith.

18 THE WITNESS: No problem, Scott.

19 MR. SIMMONS: Pete, do you have
20 anything?

21 MR. SALSICH: I don't have anything
22 to add to that. I represent Todd and
23 Todd McFarlane Productions.

24 THE WITNESS: Yeah, I talked to
25 Michael before.

1 MR. SALSICH: I work with Mike.
2 He's out of town today so you got me. Sorry I
3 couldn't come up with something to add.

4 THE WITNESS: Again, I wish I could
5 be more help on some stuff, guys, but, you
6 know, I'm getting old and I have trouble
7 finding my car keys some days.

8 MR. SIMMONS: Mr. Smith, if that's
9 it, the court reporter, within the next couple
10 of weeks, will come up with a transcript of
11 this deposition, and we'll send it out to you
12 for your review, and if there's any -- you
13 should -- at that point you should read it
14 over and make sure that she didn't get
15 anything wrong as far as you can tell, and
16 you'll be able to note if you think there are
17 any corrections that should be made to the
18 transcript.

19 THE WITNESS: Okay. And what after
20 that?

21 MR. SIMMONS: Then after that,
22 you're probably done, if all goes well.

23 THE WITNESS: Okay. I didn't know
24 if you needed me to do anything else or --

25 MR. SIMMONS: Not as far as I know.

Deposition of STEVEN SCOTT SMITH, 8/27/02

1 I don't know if anybody else has other plans.

2 THE WITNESS: Okay.

3 MR. SIMMONS: I think at this
4 point, then, we're done.

5 (adjourning at 2:15 p.m.)

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1 STATE OF WISCONSIN)

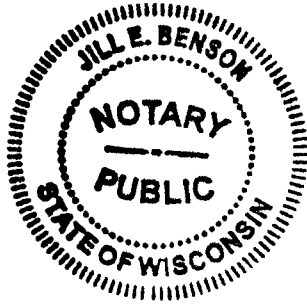
2) ss.

3 COUNTY OF DANE)

4 I, JILL E. BENSON, a Registered Professional Reporter
5 and Notary Public duly commissioned and qualified in and
6 for the State of Wisconsin, do hereby certify that
7 pursuant to notice, there came before me on the 27th day
8 of August, 2002, at 1:30 in the afternoon, at the
9 offices of Foley & Lardner, Attorneys at Law, 150 East
10 Gilman Street, the City of Madison, County of Dane, and
11 State of Wisconsin, the following named person, to wit:
12 STEVEN SCOTT SMITH, who was by me duly sworn to testify
13 to the truth and nothing but the truth of his knowledge
14 touching and concerning the matters in controversy in
15 this cause; that his was thereupon carefully examined
16 upon his oath and his examination reduced to typewriting
17 with computer-aided transcription; that the deposition
18 is a true record of the testimony given by the witness;
19 and that reading and signing was waived.

20 I further certify that I am neither attorney
21 or counsel for, nor related to or employed by any of the
22 parties to the action in which this deposition is taken
23 and further that I am not a relative or employee of any
24 attorney or counsel employed by the parties hereto or
25 financially interested in the action.

1 In witness whereof I have hereunto set my
2 hand and affixed my notarial seal this 3rd day of
3 September, 2002.



Jille Benson
Registered Professional Reporter
Notary Public, State of Wisconsin